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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RIFKIN TEXTILES CORP.,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MENAHEM STIM
ALLEN S. STIM
Attorneys for Petitioner
Members of the Bar of
The Supreme Court of the
United States
29 Broadway
New York, N. Y. 10006
Tel. (212) WH 4 2644

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

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IN THE

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RIFKIN TEXTILES CORP.,

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—against—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Jurisdictional Statement

To the Supreme Court of the United States:

RIFKIN TEXTILES CORP., the petitioner herein prays that a Writ of Certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals, dated and entered the 29th day of June, 1967. Copies of the judgment and decision upon which it is based are annexed hereto as part of the appendix. The case has not yet been officially reported.

The aforementioned judgment affirmed the decision and judgment of the United States Customs Court, First Division, dated and entered the 13th day of December, 1965, and reported in 55 Cust. Ct. 341, C.D. 2600, reh. den. 56 Cust. Ct. 892, Abs. 69834, which with one judge dissenting

(Opinion by Hon. David J. Wilson, with Hon. Webster J. Oliver, Chief Judge concurring. Hon. Morgan Ford dissenting), held the merchandise in issue to be dutiable at the rate of 37.5 cents per pound and 60 per centum ad valorem as "woven fabrics of wool * * * others", under the provisions of Item 336.50 of the Tariff Schedules of the United States. A copy of this decision is annexed hereto as part of the appendix.

No petition for rehearing has been made to the United States Court of Customs and Patent Appeals.

The petitioner has not applied for an extension of time within which to petition for a Writ of Certiorari and the final date for filing such petition is the 27th day of September, 1967.

Jursdiction is conferred upon the Supreme Court of the United States to review the judgment of the United States Court of Customs and Patent Appeals by Writ of Certiorari under Title 28, U.S.C. Section 1256.

Questions Pr sented for Review

1. Was the imported fabric at bar "ornamented" so that it is properly classifiable under Item 353.50 of the Tariff Schedules of the United States at the rate of 42.5 per centum ad valorem as "ornamented fabrics in the piece" and not as "woven fabrics, of wool * * * other" under Item 336.50 of said Tariff Schedules at the rate of 37.5 cents per pound and 60 per centum ad valorem, as classified by United States Customs and did the United States Customs Court and the United States Court of Customs and

Patent Appeals in effect make an unauthorized amendment of Item 353.50 of the Tariff Schedules of the United States when they ignored the statutory definition and the common usage of the term "ornamented fabrics, in the piece * * *" as used in said Item 353.50 and interpreted a so called commercial or trade usage to apply?

2. Was petitioner denied due process of law in the United States Customs Court when said Court refused to allow petitioner plaintiff to offer evidence of the meaning of the term "ornamented fabrics" in the trade and industry either on petitioner's direct case or in rebuttal to the testimony of defendant respondent's expert witnesses and where said Court in its decision based great reliance upon the testimony of said witnesses of defendant respondent?

Statutes in Point

The portions of the Tariff Schedules of the United States effective August 31, 1963, which are pertinent to the classification of the merchandise at bar, read as follows:

A. **Headnote to Subpart B of Schedule 3, Part 4**

Subpart B, Lace, Netting and Ornamented Fabrics

SUBPART B HEADNOTES

1. This subpart covers only (a) textile fabrics in the piece, of any width, including edgings, insertings, galloon, flouncings, and all-over and (b) textile motifs. Fabrics described in part 3 * * * of this schedule are covered by item 353.50 if ornamented.

B. Classification and Rates for Item 353.50

Item	*Article*	*Rate of Duty*
353.50	Ornamented fabrics, in the piece, and ornamented motifs, not specially provided for	42.5% ad val.

C. Schedule 3 Headnotes

3. For the purpose of the tariff schedules—

(a) the term *"ornamented"*, as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—

(i) fibers, filaments (including tinsel wire and lame), yarns or cordage, any of the foregoing introduced as needlework or otherwise, including—

(A) embroidery, and pile or tufting, whether wholly cut, partly cut, or not cut, and

(B) other types of ornamentation, but not including functional stitching or one row of straight hemstitching adjoining a hem;

(ii) burnt-out lace;

(iii) lace, netting, braid, fringe, edging, tucking, or trimming, or textile fabric;

(iv) applique and replique work, beads, bugles, spangles, bullions, or ornaments; or

(v) any combination of the foregoing types or methods of ornamentation;

(b) ornamentation of the types or methods covered hereby consists of ornamenting work done to a preexisting textile fabric, whether the ornamentation was applied to such fabric—

(i) when it was in the piece;

(ii) after it had been made or cut to size for particular furnishings, wearing apparel, or other article, or

(iii) after it had actually been incorporated into another article, and if such textile fabric remains visible, at least in significant part, after ornamentation: *Provided,* That lace, netting, braid, fringe, edging, tucking, trimming, or ornament shall not be required to have had a separate existence from the fabric or other article on which it appears in order to constitute ornamentation for the purposes of this headnote; and

(c) applique work, beads, bugles, spangles, bullions, and other forms of nontextile ornamentation applied to a textile fabric or other article of textile materials shall be disregarded in determining the component material of chief value of such fabric or other article.

D. **Classification and Rate for Item 336.50**

Item	*Article*	*Rate of Duty*
336.50	Other (woven fabrics, of wool weighing over four ounces per square yard) Valued not over $1.26⅔ per pound	37.5¢ per pound plus 60% ad val.

Concise Statement of the Case

The jurisdiction of the United States Customs Court, First Division, was originally invoked under Title 28, U.S.C. Section 1541 as the case involves a protest by petitioner-plaintiff, Rifkin Textiles Corp., against a decision relating

to the classification of certain imported merchandise by the Collector of Customs at the port of New York.

The merchandise in the case at bar consists of a woven wool fabric, imported in the piece, having braid securely sewn over both selvaged edges for the full length of the piece. The importation in question was classified under item 336.50 as "woven fabrics, of wool * * * other" at the rate of 37.5 cents per pound and 60 percentum ad valorem. Petitioner-Plaintiff claims the merchandise is an ornamented fabric and, therefore, properly classifiable under item 353.50 of the Tariff Schedules of the United States at the rate of 42.5 per centum ad valorem as "ornamented fabrics in the piece."

The record in the case at bar consists of the testimony of four witnesses for the petitioner-plaintiff and seven witnesses who testified on behalf of the respondent-defendant, as well as five exhibits received in evidence.

The pertinent exhibits in point are:

(Petitioner) Plaintiff's exhibit 1, a representative sample of the merchandise at bar (11)*, cut from a bolt of woven wool fabric, and with braid sewn over both selvaged edges for the full length of the piece (12, 17-18);

(Petitioner) Plaintiff's exhibit 2, an affidavit by Irving N. Rifkin, president of the petitioner, plaintiff-importer stating that plaintiff's exhibit 1 is a representative sample of the merchandise at bar and to which is appended the invoice of the exporter of the goods which describes the

* Numerals in parenthesis unless otherwise designated refer to page numbers of Record on Appeal in the United States Court of Customs and Patent Appeals.

importation as ornamented wool fabric and states that the ornamentation is provided by the braid (17, 18, 46);

(Petitioner) Plaintiff's exhibit 4, a skirt with braid thereon, manufactured from a woven wool fabric with braid identical to the importation at bar in all respects, except that the fabric employed in manufacturing the skirt has braid sewn for the full length of the piece over only one selvaged edge (56-59, 142-144);

(Petitioner) Plaintiff's exhibit 5, a dress with braid thereon manufactured with woven wool fabric with braid identical to the imported merchandise in all respects, except that the fabric used in manufacturing the dress had braid sewn for the full length of the piece over only one selvaged edge (59-62, 167-172).

(Respondent) Defendant's collective illustrative exhibit A, a number of woolen fabrics, of different colors, illustrating the manner in which the braid was attached to the fabric and what the material was like before the braid was sewn on (22).

Petitioner Plaintiff called as its first witness Richard E. Nathan, member of the bar, who stated that, upon request of counsel for the plaintiff, he had made an examination of records of various commercial dictionaries in order to determine a definition for the word "ornamented." He then read into the record the definition of the word "ornament," as defined in Webster's New International Dictionary, second edition, unabridged (42-45).

Irving N. Rifkin, president of the petitioner plaintiff corporation, was then called to the stand by petitioner-plaintiff, to prove the meaning of the term "ornamented"

but he was not allowed to testify. Counsel for petitioner was told by the Court as follows:

> "Judge Wilson: You should reserve that for your rebuttal" (47).

The petitioner-plaintiff then rested.

In addition to petitioner plaintiff's evidence, the United States Customs Court, First Division, consulted dictionaries upon its own initiative.

Reference to lexicographic authorities by the Court supplied the following definitions of the terms "ornament," "ornamented," or "ornamentation":

Webster's New International Dictionary, second edition, unabridged, 1956 edition, at page 1722:

> ornament * * * 1. An article of equipment; an adjunct, primarily useful, as of clothing, furniture, etc. * * * 2. a That which is added to embellish or adorn; that which adds grace or beauty; an embellishment; a decoration. * * * b An object of quality which serves to adorn. * * * 3. * * * 4. Addition or inclusion of anything that beautifies; ornamentation; embellishments; decoration. 5. *Music.* * * * 6. *Print.* * * *.
>
> ornament; ORNAMENTED; ORNAMENTING. To provide with ornament; decorate; embellish; as, to *ornament* a room, or a city.
>
> ornamentation * * * 1. Act or process of ornamenting; state of being ornamented. 2. That which ornaments; use of ornament.

New Standard Dictionary of the English Language, Funk & Wagnalls Company, New York, 1961:

ornament * * * vt. To embellish with ornaments; adorn; bedeck; * * *.

ornament, n. 1. A part or an addition that contributes to the beauty or elegance of a thing; an embellishment; adornment * * *. 2. Ornamentation in the abstract or as a quality, or ornaments collectively * * *

ornamental * * * 1. *a.* Of the nature of ornament; serving to adorn * * *. II. n. An ornamental object * * *.

ornamentation * * * *n.* 1. The act of adorning, or the state of being adorned * * *. 2. Those things collectively by which anything is ornamented or adorned. 3. A form of accessory or dependent art whose function it is to ornament objects.

ornamentative * * * *a.* Tending or striving to adorn; ornamental.

The Oxford English Dictionary, volume VII, Claredon Press, Oxford, 1933:

ornament * * * 2. Something employed to adorn, beautify, or embellish, or that naturally does this; a decoration, embellishment * * *. b. *fig.* A quality or circumstance that confers beauty, grace, or honour. * * * 3. The action of adorning or fact of being adorned; adornment, embellishment, decoration (*lit.* or *fig.*); that in which this is embodied or consists.

ornament * * * *v.* * * * To furnish with ornament, to make ornamental; to adorn, deck, embellish, beautify. * * * Hence ornamented *ppl. a.*

ornamentability * * * Capability of being adorned: * * *.

ornamental * * * *a.* * * * Of the nature of an ornament, serving as an ornament or decoration: adding beauty and attractiveness; decorative. B. *Sb. pl.* Things that are ornamental; adornments, embellishments, as opposed to *essentials.*

ornamentation * * * 1. The action or process of ornamenting; the state of being adorned; * * * 2. That in which the process of ornamenting is embodied; the ornaments which adorn a thing collectively; ornament in general.

In Funk & Wagnalls New Standard Dictionary, 1956, page 2222, we find:

selvage, * * * The edge of a piece of cloth or textile fabric when so woven or finished that it will not ravel and needs no hemming; also, a narrow strip or list of different texture or finish, woven along the edge of a fabric, which is to be removed or covered by the seam when the fabric is made up.* (A6-A8)

Respondent defendant called seven witnesses who were as follows:

Jack Schwartz, executive director of the Pleaters, Stitchers, and Embroiderers Association (48);

Edwin Wilkinson, president of the National Association of Wool Manufacturers (72);

George Selden, who is the vice president of Manchester Worsted Mills, Inc. and president of World Traditionals, Inc. (84);

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* Numerals in parentheses preceded by letter "A" refer to pages of the Appendix to this petition.

Arthur Price, associate professor of textile science at the Fashion Institute of Technology in New York City, and sometimes employed at the United States Naval Supply Research and Development Facility as a textile engineer (92-104);

Vincent Dante, designer and couturier of ladies' garments (105);

William M. Kleinwald, president of Hollander Lace & Embroidery Corp. (114) and;

Lynwood J. Groder, stylist and designer for Pacific Mills Worsted Co. (124).

The witnesses for respondent-defendant, who were considered by the courts below as experts in their field, testified that in their opinions the imported fabric at bar, plaintiff's exhibit 1, was not an ornamented fabric.

Petitioner-plaintiff called three witnesses in rebuttal for the purpose of showing that plaintiff's exhibit 1 was an ornamented fabric. These witnesses were as follows:

Jack Rosenblum, who testified that he has worked for the last twenty years for Pepi Lynn, Inc., New York City, a manufacturer of ladies' skirts and sportswear, as a stylist, production man, and salesman and that he has been in that field for a total of thirty five years (139-140). The court, after discussion, subsequently ruled (150, 164) that Mr. Rosenblum's testimony was admissible only for the purpose of connecting up plaintiff's exhibit 4 with the merchandise at bar and disregarded the fact that this witness who had been qualified as an expert, testified that in his opinion the merchandise in issue is ornamented (151, A12). Rosenblum testified that he had manufactured plaintiff's

exhibit 4 from a fabric which had braid along only one edge (142) and which was not made from the merchandise before the Court (151, 153);

Robert Frank, president of Budget Dress Corporation, and in the textile business for thirty five years was not allowed to testify whether in his opinion plaintiff's exhibit 1 is a ornamented fabric or as to the meaning of the term "ornamented". The court sustained objection of the respondent-defendant to any such testimony by this witness, on the ground that such testimony should have been produced on plaintiff's case "in chief" and not in rebuttal, in order to sustain the burden of proof imposed upon the plaintiff in this case (163, 164) and;

Oscar Zinn, who testified that he is in charge of selling and styling textiles for the petitioner-plaintiff. Zinn testified that he is in the garment industry since 1929 (167), that he styled and assisted in the production of petitioner-plaintiff's exhibit 5, the grey dress, and that the fabric used in the production of this article was similar to petitioner-plaintiff's exhibit 1, except that the braid on petitioner-plaintiff's exhibit 5 was only attached on one selvage (168); and that the selvage on plaintiff's exhibit 1 is part of the fabric (174). The Court refused to allow Zinn to testify whether or not in his opinion plaintiff's exhibit 1 is ornamented or not (175).

With the conclusion of the testimony of Oscar Zinn both sides rested (177).

REASONS RELIED ON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI

POINT I

The imported fabric at bar is properly classifiable under Item 353.50 of the Tariff Schedules of the United States as "ornamented fabrics in the piece * * *" and the act of the lower courts in ignoring the statutory definition and the common usage of said terms as used in everyday English and interpreting a so called limited commercial or trade usage to apply so as not to hold the merchandise at bar classifiable under said item, constituted an unconstitutional amendment of said item by the lower courts.

As stated by Judge Ford in his dissenting opinion in the Customs Court, this is a case of first impression as the decision is one of the first promulgated by the courts under the new Tariff Schedules of the United States, and therefore there is no case law relating to the statutory language involved herein (196, A20).

The new language involved and used in Item 353.50 of the Tariff Schedules provides for "ornamented fabric." A definition of the term "ornamented" is contained in the headnotes to such Tariff Schedules and provides as follows:

> "3. For the purposes of the tariff schedules—
>
> (a) the term *"ornamented"*, as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—
>
> • • • • •
>
> (iii) lace, netting, braid, fringe, edging, tucking, or trimming, or textile fabric;" (A3)

At the trial the petitioner-plaintiff, after placing plaintiff's Exhibit 1 in evidence, the merchandise at bar (11, 12), called Richard E. Nathan, an attorney, as a witness to testify as to the dictionary meaning of the words "ornamented" or "ornament" (38, 39) and the term was defined by the witness reading from Webster's New International Dictionary, Second Edition, Unabridged, as follows:

> "The Witness: 'Ornament' as a noun: '1. An article of equipment; an adjunct, primarily useful, as of clothing, furniture, etc. Archaic, except in ecclesiastical usage.' Then there is a reference to Tennyson.
>
> "2.a. That which is added to embellish or adorn; that which adds grace or beauty; an embellishment; a decoration. Ornament, as in architecture, is often distinguished as structural when it is an integral part of what it adorns; or as applied when executed on the surface of something structurally complete without it. See Applique, adjective. b. An object or quality which serves to adorn.
>
> The ornament of a meek and quiet spirit. 1 Pet. iii 4.
>
> 3. One whose qualities adorn or confer luster on those about him; as, an ornament to his age.
>
> 4. Addition or inclusion of anything that beautifies; ornamentation; embellishment; decoration.
>
> 5. Music. An embellishing note or notes not belonging to the essential harmony or melody, and indicated by the composer or introduced by the performer for purely decorative effect. Ornaments were especially common from the 16th to the 18th century.' The dictionary then gives some synonyns of 'ornament' in that usage.

"6. Print. A decorative design, as one used to break a blank spot on a page.'

We now have a definition of 'ornament' as a verb, indicating ornamented or ornamenting to be alternate ways of using it. The definition is 'To provide with ornament; decorate; embellish; as, to ornament a room, or a city. Synonym—See Adorn." (44, 45)

As appears in the statement of facts, *supra*, the petitioner-plaintiff was restricted in his proof to the dictionary meaning and the exhibits.

The Customs Court in its opinion made reference to lexicographic authorities (184-186, A8-A10), however, no reliance was placed upon these authorities and the court immediately proceeded to discuss the testimony in the record.

It appears from the record that petitioner plaintiff's exhibit 1 is a representative sample of the merchandise at bar, which is a wool fabric with braid sewn over both selvaged edges for the full length of the piece (12, 17, 18). As a sample of the merchandise at bar (petitioner-plaintiff's Exhibit 1) is considered a patent witness (see *United States* v. *The Halle Bros. Co.*, 20 CCPA 219, T.D. 45995; *United States* v. *Fred Gretsch Mfg. Co., Inc.*, 28 CCPA 26, C.A.D. 120), it is submitted that petitioner-plaintiff proved his case by producing said exhibit and proving that it came within the commonly accepted meaning of the statutory language. See wording of Item 353.50 of the Tariff Schedules and the statutory definition of the term "ornamented" contained in Schedule 3 Headnotes (a)(iii), page 4 of this petition (*supra*) defining the term ornamented with reference to textiles to include ornamented with braid.

That such statutory language, in this case a tariff term, is presumed to be the same as its *common or dictionary meaning* in the absence of evidence to the contrary, see *United States* v. *C. J. Tower & Sons,* 48 CCPA (Customs) 87, C. A. D. 770. Furthermore it is presumed that a term used in the tariff act has the same meaning in commerce as that in common use unless otherwise proved. See *Floral Arts Studio, et al.* v. *United States,* 46 CCPA (Customs) 21, C. A. D. 690.

The common meaning of the statutory language "ornamented fabrics" is a matter of law to be determined by the court. It is well settled that the common meaning of a tariff term is not a question of fact, but a question of law. *United States* v. *National Carloading Corp., James S. Baker Import Co.,* 48 CCPA (Customs) 70, 71, C. A. D. 767; *United States* v. *O. Brager-Larsen,* 36 CCPA (Customs) 1, 3, C. A. D. 388; *United States* v. *Shalom & Co.,* 33 CCPA (Customs) 29, 35, C. A. D. 311; *Stephen Rug Mills* v. *United States,* 32 CCPA 110, 115, C. A. D. 293; *United States* v. *Florea & Co., Inc.,* 25 CCPA (Customs) 292, 296, T. D. 49396.

The rule is established that the courts are bound by the specific wording of the statute. See *Atlantic Aluminum & Metals Distributors Inc.* v. *United States,* 47 CCPA (Customs) 88, C. A. D. 735.

Various cases holding that the language of the Tariff Schedules of the United States or their predecessor should be construed in their common sense ordinary usage are *United States* v. *A. A. Valentine & Co.,* 166 Fed. 735 (appliqued goods held ornamental although there is a difference of opinion as to what is ornamental); *E. C. Carter & Son, Inc.* v. *United States,* 38 Cust. Ct. 368, C.D. 1889, (the de-

gree of ornamentation held immaterial as long as patterns or designs in fabric are of such a nature to ornament fabric, therefore merchandise was classified as ornamental); *H. D. Smith & Co.* v. *Peck, Stow & Wilcox Co.*, 258 Fed. 40 (that if design is pleasing to the eye of some people it comes within the term "ornamental"; and *Michaelian & Kohlberg Inc.* v. *United States*, 22 CCPA 551, T.D. 47554 (the United States Court of Customs & Patent Appeals held that stitching on exhibit which was held by lower court to be the crudest effect of embroidery, to be ornamental, as it came within the statutory definition).

As was stated by Judge Ford below in his dissenting opinion in the Customs Court in referring to petitioner-plaintiff's exhibit 1, the imported merchandise at bar:

> "* * * What embellishes, adorns, bedecks, or beautifies an article varies with each individual. Consequently, what is pleasing to the eye of one person may be garish to the eye of another. Bearing in mind that the cloth involved herein is inexpensive and made of reprocessed wool, the application of a cheap braid in and of itself does not take it out of the term 'ornamented.' One would not ordinarily expect the same quality of braid to be utilized on expensive cloth as is used on inexpensive cloth. To me, based upon the record and the foregoing, plus the fact that a sample is a potent witness, the affixing of braid on the cloth, whether it is on the selvage or otherwise, is not for a utilitarian purpose. Therefore, it has been placed on the cloth for either the purpose of ornamentation or to obtain the lowest rate of duty. With respect to the latter purpose, an importer may fashion his merchandise in any manner which might subject the merchandise to the lowest rate of duty. The enactment of the Tariff Schedules of the United States does not in any way change this basic principle

which has been approved by various courts over the years. *Merritt* v. *Welsh*, 104 U. S. 694; *Seeberger* v. *Farwell*, 139 U. S. 608; *Lang et al.* v. *United States*, 10 Ct. Cust. Appls. 228, T. D. 38563; *Michaelian & Kohlberg, Inc.* v. *United States*, 22 CCPA 51, T. D. 47554.

Therefore, if the involved cloth is ornamented, even though the braid is affixed for obtaining the lower rate of duty, it is still within the provision of item 353.50. * * *"

It is respectfully submitted that the record definitely establishes that the merchandise at bar, petitioner-plaintiff's Exhibit I, is "Ornamented" within the meaning of Item 353.50 and the statutory definition of the term as contained in Schedule 3 Headnotes (a)(iii) of the Tariff Regulations of the United States and any attempt by the Courts below to change the meaning of the language of said item was error and an unconstitutional assumption of power by the Courts below to amend the Tariff Schedules of the United States.

POINT II

The refusal of the Customs Court to allow petitioner plaintiff to offer evidence of the meaning of the term "ornamented fabrics" in the trade and industry, either on plaintiff's direct case or in rebuttal, constituted a denial of due process of law.

While the main issue of the case was whether or not the merchandise at bar was classifiable as "Ornamented fabrics in the piece * * * " under Item 353.50 of the Tariff Schedules of the United States, the Customs Court refused to allow the petitioner plaintiff to present testimony as to the

meaning of the term "ornamented" in the trade, either on petitioner plaintiff's direct case—See proffered testimony of the witness Rifkin (47)—or in rebuttal to testimony given on respondent defendant's case—See rulings sustaining objection to testimony of petitioner plaintiff's rebuttal witnesses Frank (165) and Zinn (175)—while the testimony of petitioner plaintiff's witness Rosenblum that in his opinion the merchandise at bar is ornamented (151) was ignored by the Customs Court as improper rebuttal testimony (A12).

It is to be noted that on petitioner plaintiff's direct case that the petitioner plaintiff's proof was restricted to the offer of various exhibits in evidence and the dictionary definitions of the words "ornamented" and "ornament"—See testimony of petitioner plaintiff's witness Nathan (43 etc.) and the proffered testimony of petitioner plaintiff's witness Irving N. Rifkin (46-47) and that when petitioner plaintiff's counsel sought to question the witness Rifkin as to the meaning of the word "ornamented" in the trade or commercial sense, objection to this line of questioning was sustained and petitioner plaintiff's counsel was told by the Court as follows:

> "Judge Wilson: You should reserve that for your rebuttal." (47)

It is noteworthy to observe that in the decisions of the Customs Court (186-189, A9-A11) and United States Court of Customs and Patent Appeals (A29-A31), great stress is placed upon the testimony of the respondent defendant's expert witnesses that the merchandise at bar was not ornamented in the trade or commercial sense while direct or rebuttal testimony to the contrary by expert witnesses on behalf of petitioner plaintiff was either excluded or ignored

by the said courts as improper rebuttal—Customs Court (189-190, A12) and United States Court of Customs and Patent Appeals (A29).

Certainly the acts of the Customs Court in limiting petitioner plaintiff in the presentation of his proof constituted a denial of due process. See *Hass* v. *United States*, 93 F. 2d 427, 437 (U.S.C.A. 8th 1937).

See also *Hicks* v. *Hyatt*, 64 F. Supp. 238 (Dist. Ct., M.D. Pa. 1946) where refusal to admit evidence necessary for the proper determination of the case on a court-martial was held by the District Court on petition for habeas corpus to be a denial of due process and *United States* v. *Garfinkel*, 119 F. Supp. 810 (Dist. Court, W.D. Pa. 1954) holding that error in the reception of evidence at a hearing before the Immigration & Naturalization Service, prejudicial to the petitioner constituted such a denial of due process as to warrant the granting a petition for a writ of habeas corpus.

It is respectfully submitted that the rulings of the Customs Court with regard to the admission of evidence, as hereinbefore set forth, was so unfair as to constitute a denial of due process of law to petitioner plaintiff.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MENAHEM STIM
ALLEN S. STIM
Members of the Bar of the
Supreme Court of the United States,
Attorneys for Petitioner-Appellant

APPENDIX A

Decision of the Customs Court

(C.D. 2600)

RIFKIN TEXTILES CORP. *v.* UNITED STATES

United States Customs Court, First Division

Protest 64/9704-1162 against the decision of the collector of customs at the port of New York

(Decided December 13, 1965)

WILSON, Judge: The merchandise in the case at bar consists of a woven wool fabric, imported in the piece, having braid securely sewn over both selvaged edges for the full length of the piece. The importation in question was classified under item 336.50 as "woven fabrics, of wool * * * other" at the rate of 37.5 cents per pound and 60 per centum ad valorem. Plaintiff claims the merchandise is an ornamented fabric and, therefore, properly classifiable under item 353.50 of the Tariff Schedules of the United States at the rate of 42.5 per centum ad valorem as "ornamented fabrics in the piece."

Item 336.50 of the Tarff Schedules of the United States, under which the imported merchandise was classified, provides:

> Other [woven fabrics, of wool weighing over four ounces per square yard]:
>
> Value not over $1.26⅔ per pound ..... 37.5¢ per lb. plus 60% ad val.

The portions of the tariff schedules pertinent to the classification of fabrics, ornamented with braid, provide in part as follows:

1. [Headnote to subpart B of schedule 3, part 4]:

Subpart B—Lace, Netting and Ornamented Fabrics
Subpart B headnotes:

1. This subpart covers only (a) textile fabrics in the piece, of any width, including edgings, insertings, galloons, flouncings, and all-overs and (b) textile motifs. *Fabrics described in* part 3 * * * *of this schedule are covered by item 353.50 if ornamented.* [Tariff Schedules, U.S. Code Cong. & Admin. News, p. 2336 (1963).] [Emphasis added.]

2. [Classification and rates for item 353.50]:

Item	Article	Rate of Duty
353.50	Ornamented fabrics, in the piece, and ornamented motifs, not specially provided for	42.5% ad val.

[Tariff Schedules, U.S. Cong. & Admin. News, p. 2337 (1963)]

3. Schedules 3 headnotes:

* * * * * * *

3. For the purposes of the tariff schedules—

(a) the term '*ornamented*', as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—

(i) fibers, filaments (including tinsel wire and lame), yarns, or cordage, any of the foregoing introduced as needlework or otherwise, including—

(A) embroidery, and pile or tufting, whether wholly cut, partly cut, or not cut, and

(B) other types of ornamentation, but not including functional stitching or one row of straight hemstitching adjoining a hem;

(ii) burnt-out lace;

(iii) lace, netting, *braid*, fringe, edging, tucking, or trimming, or textile fabric; [Emphasis added.]

* * * * * * *

The record in the case at bar consists of the testimony of four witnesses for the plaintiff and seven witnesses who testified on behalf of the defendant, as well as five exhibits received in evidence.

Plaintiff's exhibit 1 is a sample representative of the merchandise at bar (R. 3), cut from a bolt of woven wool fabric, and, as heretofore indicated, with braid sewn over both selvaged edges for the full length of the piece (R. 4-5). Plaintiff's exhibit 2 is an affidavit by the president of the plaintiff-importer stating that plaintiff's exhibit 1 is a sample representative of the merchandise at bar and to which is appended the invoice of the exporter of the goods which describes the importation as ornamented wool fabric and states that the ornamentation is provided by the braid. Plaintiff's exhibit 4 is a skirt with braid thereon, manufactured from a woven wool fabric with braid identical to the importation at bar in all respects, except that the fabric employed in manufacturing the skirt has braid sewn for the full length of the piece over only one selvaged edge

(R. 70). Plaintiff's exhibit 5 is a dress with braid thereon manufactured with woven wool fabric with braid identical to the imported merchandise in all respects, except that the fabric used in manufacturing the dress had braid sewn for the full length of the piece over only one selvaged edge (R. 77, 235). Defendant's collective illustrative exhibit A consists of a number of woolen fabrics, of different colors, and illustrates the manner in which the braid was attached to the fabric and what the material was like before the braid was sewn on (R. 18).

Plaintiff called as its first witness, Mr. Richard E. Nathan, member of the bar, who stated that, upon request of counsel for the plaintiff, he had made an examination of records of various commercial dictionaries in order to determine a definition for the word "ornamented." He then read into the record the definition of the word "ornament," as defined in Webster' New International Dictionary, second edition, unabridged (R. 50-52).

Plaintiff, in support of the claimed classification, called three witnesses on its behalf in so-called rebuttal for the purpose of showing that plaintiff's exhibit 1 was an ornamented fabric. The first of these was Mr. Jack Rosenblum, who stated that he is employed by Pepi Lynn, Inc., New York City, a manufacturer of ladies' skirts and sportswear, as a stylist, production man, and salesman (R. 190-191). The court, after discussion, subsequently ruled (R. 229) that Mr. Rosenblum's testimony was admissible only for the purpose of connecting up plaintiff's exhibit 4 with the merchandise at bar. The witness stated that he had manufactured plaintiff's exhibit 4 from a fabric which had braid along only one selvage (R. 195), and which was not made

from the merchandise before the court (R. 212). With respect to the use of selvage by the witness, Mr. Rosenblum testified, on cross-examination, as follows:

> Q. * * * How do you normally use the selvage?—A. Normally if it doesn't have any ornamentation for any garment, I would cut it, and if it fell into the seam, that is where it would end up. [R. 224.]
>
> * * * * *
>
> Q. And I understand your testimony now then to be that normally the selvage is used in the seam, or the hem, or some other part of the garment which is not visible?—A. That is right. [R. 225.]

Plaintiff also called as a witness in rebuttal for the purpose of showing that plaintiff's exhibit 1 was an ornamental fabric, Mr. Robert Frank, president of a dress manufacturing concern. The court sustained the objection of the defendant to any testimony to be given by this witness, on the ground that such testimony should have been produced on plaintiff's case "in chief" and not in rebuttal, in order to sustain the burden of proof imposed upon the plaintiff in this case (R. 227-230).

Plaintiff's last witness was Mr. Oscar Zinn, who stated that he is in charge of selling and styling textiles for the Rifzin Textiles Corp. (originally called Rifkin Textile Corp. (R. 244)). The witness stated that he is neither a stockholder nor an officer of the latter corporation (R. 231). Mr. Zinn further stated that he styled and assisted in the production of plaintiff's exhibit 5, the grey dress, and that the fabric used in the production of this article was

similar to plaintiff's exhibit 1, except that the braid on plaintiff's exhibit 5 was only attached on one selvage (R. 234-235). Mr. Zinn then stated that the selvage on plaintiff's exhibit 1 is part of the fabric (R. 244-245).

As heretofore indicated, the issue in the case at bar is whether or not the imported fabric is "ornamented" so that it is properly classifiable under the pertinent item of the tariff schedule as an "ornamented fabric." Admittedly, we are here concerned with the common meaning of the word "ornamented" in our determination of the classification of the involved fabric. The common meaning of a term is a matter of law to be determined by the courts. In making such determination, courts may receive evidence as to the common meaning, which is advisory only, and may consult dictionaries and other authorities and may also draw upon their own knowledge. *Alfred Mazer* v. *United States*, 25 Cust. Ct. 67, C. D. 1265.

Reference to lexicographic authorities supplies the following definitions of the terms "ornament," "ornamented," or "ornamentation":

Webster's New International Dictionary, second edition, unabridged, 1956 edition, at page 1722:

> ornament * * *1. An article of equipment; an adjunct, primarily useful, as of clothing, furniture, etc. * * * 2. a That which is added to embellish or adorn; that which adds grace or beauty; an embellishment; a decoration. * * * b An object or quality which serves to adorn. * * * 3. * * * 4. Addition or inclusion of anything that beautifies; ornamentation; embellishments; decoration. 5. *Music.* * * * * 6. *Print.* * * *

ornament; ORNAMENTED; ORNAMENTING. To provide with ornament; decorate; embellish; as, to *ornament* a room, or a city.

ornamentation * * * 1. Act or process of ornamenting; state of being ornamented. 2. That which ornaments; use of ornament.

New Standard Dictionary of the English Language, Funk & Wagnalls Company, New York, 1961:

ornament * * * *vt.* To embellish with ornaments; adorn; bedeck; * * *.

ornament, *n.* 1. A part or an addition that contributes to the beauty or elegance of a thing; an embellishment; adornment * * *. 2. Ornamentation in the abstract or as a quality, or ornaments collectively * * *.

ornamental * * * 1. *a.* Of the nature of ornament; serving to adorn * * *. II. *n.* An ornamental object * * *.

ornamentation * * * *n.* 1. The act of adorning, or the state of being adorned * * *. 2. Those things collectively by which anything is ornamented or adorned. 3. A form of accessory or dependent art whose function it is to ornament objects.

ornamentative * * * *a.* Tending or striving to adorn; ornamental.

The Oxford English Dictionary, volume VII, Clarendon Press, Oxford, 1933:

ornament * * * 2. Something employed to adorn, beautify, or embellish, or that naturally does this; a decoration, embellishment * * *. b. *fig.* A quality or circumstance that confers beauty, grace, or honour. * * * 3. The action of adorning or fact of being adorned; adornment, embellishment, decoration (*lit.* or *fig.*); that in which this is embodied or consists.

ornament * * * *v.* * * * To furnish with ornament, to make ornamental; to adorn, deck, embellish, beautify. * * * Hence ornamented *ppl. a.*

ornamentability * * * Capability of being adorned: * * *.

ornamental * * * *a.* * * * Of the nature of an ornament, serving as an ornament or decoration: adding beauty and attractiveness; decorative. B. *Sb. pl.* Things that are ornamental; adornments, embellishments, as opposed to *essentials.*

ornamentation * * * 1. The action or process of ornamenting; the state of being adorned; * * * 2. That in which the process of ornamenting is embodied; the ornaments which adorn a thing collectively; ornament in general.

In Funk & Wagnalls New Standard Dictionary, 1956, page 2222, we find:

selvage, * * * The edge of a piece of cloth or textile fabric when so woven or finished that it will not ravel and needs no hemming; also, a narrow strip or list of different texture or finish, woven along the edge of a

fabric, which is to be removed or covered by the seam when the fabric is made up.

All of the witnesses for the defendant had extensive experience in the woolen textile industry, including embellishment operations and the styling, designing, and merchandizing of textile fabrics, or in the business of embroidering various materials. A recital of their qualifications, as disclosed by the record, appears pertinent at this juncture. Defendant's first witness was Mr. Jack Schwartz, who stated that, for the past 24 years, he has been the executive director of the Pleaters, Stitchers, and Embroiderers Association, which comprises approximately 310 small manufacturers who perform almost 100 percent of the embellishing operation (including that of braid to fabrics) on apparel and piece goods in New York City.

Defendant's second witness was Mr. Edwin Wilkinson, president of the National Association of Wool Manufacturers, who stated that he has been engaged in the wool textile industry since 1927 and whose duties as president of the association includes the representation of that body and its members before congressional committees, Government administrative agencies, and, in general, administration of the affairs of the association, which organization, it appears, produces approximately 70 percent of the wool textile fabrics on the woolen worsted system in the United States (R. 90-91).

The Government's third witness was Mr. George Selden, who stated that he is the vice president of Manchester Worsted Mills, Inc., and president of World Traditionals, Inc. The record discloses that the former company manufactures, weaves, and finishes worsted piece goods primarily

for the menswear trade, its annual business being approximately 2½ million dollars; that World Traditionals, Inc., represents various woolen mills located in Japan and England. Mr. Selden stated that his duties in both companies had to do primarily with the styling and merchandising of the fabrics manufactured by them (R. 109-111).

Mr. Arthur Price, associate professor of textile science at the Fashion Institute of Technology in New York City and sometimes employed at the United States Naval Supply Research and Development Facility as a textile engineer, whose textile experience included textile research, manufacturing, and teaching, also testified on behalf of the defendant.

Defendant's fifth witness was Mr. Vincent Dante, designer and couturier of ladies' garments, who stated that he had been in business for himself for approxiately 30 years (R. 139-140).

Defendant's next witness was Mr. William M. Kleinwald, president of Hollander Lace & Embroidery Corp., who stated that, since 1925 up to the date of trial, he has been in charge of the production and styling of laces and embroideries. The record discloses that the Hollander company embroiders materials (including woven wool fabrics in the piece) exclusively for dress and blouse manufacturers.

Defendant's last witness was Mr. Lynwood J. Groder, stylist and designer for Pacific Mills Worsted Co., who stated that he has been engaged in the women's wearing apparel industry for approximately 26 years. Mr. Groder testified that, as a stylist, he does not create garments but that he designs fabrics "using ornamentatiton."

As heretofore indicated, all of the witnesses for the defendant testified that the imported fabric was not an ornamented fabric. In summary, the pertinent reasons for this conclusion were as follows: That braid is never applied only to the selvage to produce an ornamental fabric (Witness Schwartz, R. 60); that dress manufacturers do not use merchandise similar to plaintiff's exhibit 1 in the manufacture of dresses and skirts "because they couldn't use stuff that is on the selvage. They cut the selvage off" (Witness Schwartz, R. 66); that none of the fabrics in either plaintiff's exhibit 1 or defendant's collective illustrative exhibit A would be considered in the trade to be ornamented fabrics, because the braid is attached only to the selvage, which is cut off in the end use (Witness Schwartz, R. 62-63), (Witness Wilkinson, R. 96), (Witness Price, R. 131-132), (Witness Dante, R. 142-143); that a selvage is the extreme edge of a fabric, and is not considered a useful part of the fabric, but is extraneous and is not considered in measuring its width (Witness Wilkinson, R. 95), (Witness Selden, R. 113), (Witness Price, R. 125), (Witness Dante, R. 140); that an ornamented fabric would usually have a pattern or design visible on the surface of the fabric or is one embellished in such a manner that it is evident on the fabric (Witness Wilkinson, R. 96), (Witness Selden, R. 115), (Witness Price, R. 125), (Witness Dante, R. 140), (Witness Kleinwald, R. 159); that embroidery is never applied to the selvage of a fabric, unless the selvage is part of a design (Witness Kleinwald, R. 156), (Witness Groder, R. 169).

With respect to plaintiff's exhibits 4 and 5, the witnesses for the defendant testified that the braid in plaintiff's ex-

hibit 4 is on the selvage and that it is an ornamentation on the skirt (Witness Schwartz, R. 88); that the braid on plaintiff's exhibits 4 and 5 ornaments the garments but not the fabric from which they were produced (Witnesses Wilkinson, R. 101-102, Witness Price, R. 130); that the braid on plaintiff's exhibit 4 was put on there for a utilitarian purpose, "to cover a selvage which might be raw" (Witness Kleinwald, R. 165); that the braid on plaintiff's exhibit 4 did not decorate the garment, but was just "a black piping down the front of the goods" (Witness Groder, R. 176-177).

The plaintiff, in its brief, argues that the testimony of its witness, Mr. Rosenblum, substantiates its claim that the merchandise in question is considered an ornamented fabric. However, the record discloses that the testimony to the witness was admitted solely for the purpose of establishing that the garment represented by plaintiff's exhibit 4 was produced from a fabric similar to the one here under consideration. The testimony of Mr. Rosenblum as to whether the imported merchandise is an ornamented fabric was, as heretofore indicated, ruled by the court to be improper rebuttal (R. 228-229). Further, the particular use of the merchandise at bar by plaintiff's witness Rosenblum is, in our opinion, irrelevant and immaterial in our present determination, inasmuch as the question of a specific use of this merchandise was expressly agreed upon by the parties not to be an issue in the case.

While it appears that the witnesses for the Government never dealt with piece goods having braid along both selvaged edges, yet, as heretofore indicated, the record further discloses that most of defendant's witnesses were

engaged for many years in various activities in the wool and textile industry and that the imported merchandise was a type of fabric with which all of the defendant's witnesses had dealt or had been familiar with. In our opinion, the witnesses for the defendant were competent to testify whether or not the imported merchandise was an ornamented fabric, and, specifically, whether it was so considered in the textile trade. Plaintiff, on its part, has not, in our opinion, discredited or impeached the testimony of defendant's witnesses to the effect that the merchandise represented by plaintiff's exhibit 1 is not an ornamented fabric; nor has it offered any competent evidence to the contrary in support of its claimed classification. The fact that some of defendant's witnesses stated that the garments represented by plaintiff's exhibit 4 (skirt) and plaintiff's exhibit 5 (dress) were ornamented by the braid on such articles (R. 130, R. 148), is, in our opinion, not relevant in the determination of the proper classification of the imported merchandise, which is a fabric and not a garment. Furthermore, the record discloses that these same witnesses testified that, even if the braid on the selvage as used in plaintiff's exhibits 4 and 5 ornamented those garments, this did not mean that the fabric from which these garments were produced would be considered an ornamented fabric (R. 130, R. 151-152).

Plaintiff, in its brief, has directed our attention to the holding of our courts in certain cases in an effort to establish its claim that the imported merchandise is an ornamented fabric. However, in our opinion, the situation in those cases differed from that which obtains in the case at bar. Reference to certain cases and their inapplica-

bility to the classification of the merchandise here in question may be briefly summarized as follows: In *United States* v. *A. A. Vantine & Co.*, 166 Fed. 735 (2d Cir. 1908), certain woven fabrics of silk, in the piece, 25 yards long, having a cotton cord loosely wound with gilt paper sewed upon the fabric with a colored thread, were classified as woven fabrics of silk (paragraph 387, Tariff Act of 1897) and were claimed properly classifiable under paragraph 390 of the said act as "Laces * * * and articles embroidered by hand or machinery, or tamboured or appliqued * * *." The pertinent question there was whether the cords were ornamental in nature. The court, in the *Vantine* case, *supra*, held that "Crude and unconventional though the design applied here may be," it was within the definition of "appliqué." The finding by the court therein that the cords were ornamental necessarily required a finding that the fabric itself was ornamented. There was no question in the *Vantine* case, *supra*, as there is with respect to the braid here under consideration, as to whether the cords there involved had been applied to the body of the fabric. In the case at bar, however, a finding by the court that the braid is ornamental will not automatically predicate a conclusion that the fabric in question is "ornamented" thereby, since, in our opinion, it has been established that the braid has not been applied to the basic textile material of the merchandise.

In *Michaelian & Kohlberg, Inc.* v. *United States*, 22 CCPA 551, T. D. 47554, certain Chinese rugs, having certain stitching at their ends, done by hand with needle and thread, in a simple design said to represent a Chinese dragon, were claimed properly classifiable as embroidered

articles. Testimony of witnesses there were in agreement that the stitching was in conformity with a preconceived design and that it responded to the well-known and judicially approved definitions of embroidery stitching. The court did not consider the question whether the stitching as applied ornamented the fabric, inasmuch as once it was determined that the stitching was a type of embroidery, the broad language of the pertinent paragraph of the tariff act under consideration required classification thereunder as embroidered articles. In the case at bar, however, the question for resolution is whether the braid ornaments the fabric, there being no dispute that the material on the selvages of the imported merchandise is braid. Accordingly, a mere finding that braid has been attached to the selvages of the fabric will not, in itself, be sufficient to sustain classification of the imported merchandise under item 353.50. In our opinion, the holding of our appellate court in the *Michaelian & Kohlberg* case, *supra*, is not determinative of the classification of the merchandise at bar.

In the case of *E. C. Carter & Son, Inc.* v. *United States*, 38 Cust. Ct. 368, C. D. 1889, the competition was between the provision in paragraph 1529(a) of the Tariff Act of 1930, as modified, for "Other Nets," as classified, and the provision in said paragraph, as modified, for lace, made on a bobbinet-Jacquard machine. The representative exhibit in the case consisted of a concededly net base, upon which appeared certain square dots or spots. The record in that case definitely established that the dots or spots were inwrought and that they were forms, figures, or designs on the net foundation of the merchandise in question. Plaintiff's witnesses therein testified that the inwrought

designs ornamented the net base, stating, in effect, that the representative sample came within their understanding of the term "lace". The court, in the *Carter* case, *supra*, held the merchandise there involved properly dutiable as "lace," stating, page 367, as follows:

> We are of opinion, and so hold, that when it has been established, as it has in the instant case, that the inwrought patterns or designs on the involved merchandise are ornamental or are of such character as to ornament the net fabric on which they appear, they are of sufficient importance to characterize as lace the fabric on which they appear * * *.

It would appear, therefore, that the court, in the *Carter* case, *supra*, was not asked to decide the question of ornamentation solely on the basis of a dictionary definition of the term "ornament" and a mere inspection of the merchandise claimed to be ornamented. In the case at bar, we have before us the testimony of the defendant's witnesses, well qualified in the textile trade, that the involved fabric was not ornamented, as commonly understood in the trade.

The Tariff Classification Study, published by the Tariff Commission on November 15, 1960, prior to the enactment of the tariff classification schedules, contains the following explanatory notes (schedule 3, pp. 6-7):

* * * * * * *

> Under the proposed definition of "ornamented," textile articles would no longer be assessed with rates of duty derived from paragraph 1529(a) on the

basis of concealed, functionless pieces of braid, netting, etc. The rates derived from paragraph 1529(a) would apply only if such materials were used primarily for ornamentation.

It would appear from the explanatory notes above set forth that the term "ornamented," as given in the definition of headnote 3, *supra,* is restricted to material used primarily for ornamentation. Inasmuch as the above "study" was published prior to the enactment of the schedules by Congress and was before Congress at that time, it has, in our opinion, the same standing as Summaries of Tariff Information and other informative data and digests, which information is recognized by the courts as authoritative for the purpose of resolving questions relating to the meaning and scope of terms which appear in tariff acts and in determining the intent of Congress. *Textile Printing & Finishing Co., Inc.* v. *United States,* 49 CCPA 24, C. A. D. 789.

Of particular relevancy, in our opinion, in the determination of the proper classification of the imported merchandise, is the following statement concerning item 353.50 which appears in the additional explanatory notes and background materials to the Seventh Supplemental Report of the United States Tariff Commission, issued pursuant to sections 101(b)(4) and 101(c) of the Tariff Classification Act of 1962 (P. L. 87—456), submitted to Congress, at its request, on August 14, 1963, prior to the effective date of the Tariff Schedules of the United States, page 100:

> Ornamented Fabrics. The status of fabrics in the piece with a braid attached on the selvage is subject to a different test under this term than under the applicable existing tariff provision. The existing requirement that the article merely be "in part of" braid is less exacting. Under the new provision, the braid must in fact ornament the fabric in an acceptable trade sense. This would normally call for repetitive ornamentation throughout the length of the piece goods, not so affixed that it would in normal disposition be trimmed off or hidden.

The above statement, in our opinion, clearly indicates what was meant by the use of the term "ornamented fabrics" in item 353.50 of the tariff schedules. The material, if any, applied to a fabric must ornament the fabric to constitute the latter an "ornamented fabric." It would appear that if Congress had intended the application of braid to *per se* ornament a fabric, as contended in this case by the plaintiff, then it would have used the language "in part of" braid as it had in paragraph 1529(a) of the Tariff Act of 1930. In our opinion, the fabric must be embellished or ornamented by the braid, and it is not sufficient that the braid has merely been applied in some manner, which factor appears sufficient to rule out plaintiff's interpretation of headnote 3 to schedule 3 with respect to item 353.50 based on the theory advanced by the plaintiff of braid being a type of ornamentation as opposed to a method of ornamentation. Further, of special significance in our present determination, is the reference in the above supplemental report that "Under the new provision, the braid

must in fact ornament the fabric *in an acceptable trade sense''* [italics ours]. In our opinion, the testimony of the trade witness supplied by the defendant to the effect that the merchandise represented by plaintiff's exhibit 1 is not an "ornamented fabric" conforms with the restrictive requirement indicated in the supplemental report that the braid must ornament the fabric "in an acceptable trade sense." The uncontradicted testimony of defendant's witness Mr. Wilkinson (R. 93) and that of Mr. Selden (R. 113), as heretofore indicated, clearly establishes that the selvage is not considered part of the surface of the fabric. Accordingly, in our opinion, the application of braid only to the selvages of the imported fabric does not ornament the fabric itself.

In our opinion, the record in the case at bar supports a finding that the imported merchandise is not an "ornamented fabric," as contemplated within the provisions of item 333.50 of the Tariff Schedules of the United States. Accordingly, we are of opinion and hold that the merchandise in question is properly dutiable under the provisions of item 336.50 of the Tariff Schedules of the United States at the rate of 37.5 cents per pound and 60 per centum ad valorem as "woven fabrics, of wool * * * other," as classified. The protest claim in this case is overruled.

Judgment will issue accordingly.

DAVID J. WILSON

J.

Concurring:

W. J. O.

J.

DISSENTING OPINION

FORD, Judge. This decision is one of the first promulgated by the court under the new Tariff Schedules of the United States and, consequently, there is no case law controlling the statutory language involved herein. I would, based upon the record, samples, and basic principles of law formulated over the years in the field of customs jurisprudence, sustain the protest.

The new language involved, as claimed by plaintiff, provides for "ornamented fabric." A definition of the term "ornamented" is contained in the headnotes and provides as follows:

> 3. For the purposes of the tariff schedules—
>
> (a) the term "*ornamented*", as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—
>
> * * * * *
>
> (iii) lace, netting, braid, fringe, edging, tucking, or trimming, or textile fabric;
>
> * * *

Based upon this provision, the definition, the testimony, and the information contained in the Seventh Supplemental Report, which is quoted in the majority opinion, my colleagues have concluded that the imported fabric is not within the purview of item 353.50 because it is not ornamented "in an acceptable trade sense." This, in the view of the majority, is particularly so because the record estab-

lishes that the selvage is not considered part of the fabric. Hence, the majority concludes the application of braid only to the selvage does not ornament the fabric itself.

Braided articles under the provisions of the Tariff Act of 1930 fell within the purview of paragraph 1529(a) of said act. A review of the language employed in item 353.50 clearly indicates a complete change from the language of paragraph 1529(a), *supra*, since all that was required, under said paragraph, was that said article be ornamental and be in part of any of the named articles. There does not appear to be any intent on the part of Congress in enacting the Tariff Schedules of the United States to require a commercial designation of the term "ornamental fabric." Accordingly, under the basic principles of law in this field, the common meaning is controlling, unless a party attempts to prove a commercial designation. The record does not indicate an intent on the part of either party to establish a commercial designation.

We, therefore, have before us only the question of the common meaning of the term "ornamented fabric." It is elementary principle of law that this meaning is a question of law to be determined by the court, and testimony when offered is merely advisory. *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C. A. D. 676. In order to ascertain the common meaning, the court may refer to dictionary definitions, not as evidence of the common meaning, but merely as an aid to the court in making its determination. On the other hand, commercial designation of a tariff term is a question of fact and is not subject to judicial notice.

The definition contained in the headnote and quoted, *supra,* is of little aid, at least to the writer of this opinion, since said definition utilizes the word to be defined. Some of the other definitions of the terms "ornament," "ornamental," and "ornamentation" contained in the majority opinion are more illuminating. Most of these definitions utilize the terms "adorn," "deck," "bedeck," "embellish," or "beautify."

While this case is being brought under a new tariff law (TSUS), the basic principles of law have not been changed. A sample is still considered a patent witness. *United States* v. *The Halle Bros. Co.,* 20 CCPA 219, T. D. 45995; *United States* v. *Fred. Gretsch Mfg. Co., Inc.,* 28 CCPA 26, C. A. D. 120.

An examination of the cloth involved herein establishes that the braid has been affixed on both selvages. What embellishes, adorns, bedecks, or beautifies an article varies with each individual. Consequently, what is pleasing to the eye of one person may be garish to the eye of another. Bearing in mind that the cloth involved herein is inexpensive and made of reprocessed wool, the application of a cheap braid in and of itself does not take it out of the term "ornamented." One would not ordinarily expect the same quality of braid to be utilized on expensive cloth as is used on inexpensive cloth. To me, based upon the record and the foregoing, plus the fact that a sample is a potent witness, the affixing of braid on the cloth, whether it is on the selvage or otherwise, is not for a utilitarian purpose. Therefore, it has been placed on the cloth for either the purpose of ornamentation or to obtain the lowest

rate of duty. With respect to the latter purpose, an importer may fashion his merchandise in any manner which might subject the merchandise to the lowest rate of duty. The enactment of the Tariff Schedules of the United States does not in any way change this basic principle which has been approved by various courts over the years. *Merritt* v. *Welsh,* 104 U. S. 694; *Seeberger* v. *Farwell,* 139 U. S. 608; *Lang et al.* v. *United States,* 10 Ct. Cust. Appls. 228, T. D. 38563; *Michaelian & Kohlberg, Inc.* v. *United States,* 22 CCPA 51, T. D. 47554.

Therefore, if the involved cloth is ornamented, even though the braid is affixed for obtaining the lower rate of duty, it is still within the provision of item 353.50. It is interesting to note that all of the witnesses, with the exception of Mr. Selden, called on behalf of defendant, considered one or both of the exhibits (4 and 5) ornamented by braid but steadfastly refused to state that the fabric from which they were made was ornamented by the braid. Mr. Selden had no opinion as to whether the exhibits were ornamented since he was not a dress manufacturer. These statements are to say the least paradoxical. How could cloth having braid affixed to its selvages not be ornamented, while a garment made from this cloth and utilizing the braid from these selvages be ornamented with braid?

If the court is bound by the theory of trade acceptance set forth in the Seventh Supplemental Report, *supra,* what function does the court have? Common meaning is a question of law and not fact, and, under this theory, the testimony or fact would be controlling in a question of common meaning. This is contrary to the principles of law con-

trolling common meaning. If Congress intended to make commercial designation controlling with respect to item 353.50, it could have easily done so by using the proper phraseology, such as "commercially known as ornamented fabric," or some other similar language. Since the Congress did not so provide such language, the court may only interpret the language enacted.

Based upon the foregoing, I am of the opinion that the imported fabric is ornamented within the purview of item 353.50 of the Tariff Schedules of the United States, and I would sustain the protest.

MORGAN FORD

J.

APPENDIX B

Judgment

UNITED STATES CUSTOMS COURT

First Division

Rifkin Textiles Corp., Plaintiff,

vs.

United States, Defendant.

Suit No. 64/9704-1162-64

This case having been duly submitted for decision to the First Division of the United States Customs Court, and the Court, after due deliberation, having rendered a decision herein, now, in conformity with said decision,

It Is Hereby Ordered, Adjudged, and Decreed: that the protest in this case be, and the same hereby is, overruled.

WEBSTER J. OLIVER
DAVID J. WILSON
Judges of the United States Customs Court.

Dated at New York 14, N. Y., this day 13 day of Dec., 1965.

APPENDIX C

Decision of the United States Court of Customs and Patent Appeals

October Term 1967

Customs Appeal No. 5247

RIFKIN TEXTILES CORP.,

Appellant,

—v.—

THE UNITED STATES,

Appellee.

June 29, 1967

KIRKPATRICK, Judge.

This is an appeal by the importer from the decision and judgment of the United States Customs Court, First Division (55 Cust. Ct. 341, C.D. 2600), overruling the importer's protest to the classification of certain woven wool fabrics.

The collector classified the imported merchandise as "woven fabrics, of wool . . . other" under item 336.50 of the Tariff Schedules of the United States and dutiable at the rate of 37.5 cents per pound and 60 percentum ad valorem. The importer claimed that the merchandise was more properly classified as "ornamented fabrics, in the piece" under item 353.50 of the Tariff Schedules and dutiable at the rate of 42.5 percentum ad valorem. The pertinent statutory provisions are:

Item 336.50 of the Tariff Schedules of the United States:

Other [woven fabrics, of wool weighing over four ounces per square yard]:

Valued not over $1.26⅔ per pound ....37.5¢ per lb. plus 60% ad val.

Item 353.50 of the Tariff Schedules of the United States:

Ornamented fabrics, in the piece, and ornamented motifs, not specially provided for ....42.5% ad val.

The Headnote to Schedule 3 provides in part (1963 U.S. Code Cong. & Ad. News (2336):

3. For the purposes of the tariff schedules—

(a) the term '*ornamented*', as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials which are ornamented with—

* * * * *

(iii) lace, netting, *braid*, fringe, edging, tucking, or trimming, or textile fabric; [Emphasis added.]

The parties have agreed that the imported merchandise is woven fabric of wool, imported in the piece, weighing over four ounces per square yard, having a braid securely sewn over each of the two selvage edges for the full length of the piece, and valued at not over $1.26⅔ per pound. Thus, the

sole question is whether or not the merchandise is "ornamented fabric" within the meaning of item 353.50 of the Tariff Schedules.

Both parties submitted exhibits at the trial, but only appellant's exhibits 2, 4, and 5 need be discussed here. Appellant's exhibit 2 is an affidavit, by the president of appellant-importer, which states that the imported merchandise was sold and invoiced by the exporter, and bought and accepted by the appellant, as an "ornamented fabric." Appellant's exhibit 4 is a skirt manufactured from a woven wool fabric which is similar to the merchandise in issue except that it has only one braid sewn onto one of the two selvage edges. The braided selvage is employed as a vertical edge of the skirt which is normally visible. Appellant's exhibit 5 is a dress made from woven wool fabric also having only one braid sewn onto one selvage edge. In this dress the braided selvage is employed as the finished edge for various parts, e.g. the sleeves and the pockets.

The appellant called three witnesses the first of whom, a member of the bar, read into the record the definition of "ornament" from Webster's New International Dictionary, Unabridged (2d ed. 1958):

> ornament * * * 2. a That which is added to embellish or adorn; that which adds grace or beauty; an embellishment; a decoration. * * * b An Object or quality which serves to adorn. * * * 3. * * * 4. Addition or inclusion of anything that beautifies; ornamentation; embellishments; decoration. * * *

ornament; ORNAMENTED; ORNAMENTING. To provide with ornament; decorate; embellish, as, to *ornament* a room, or a city.

Appellant's remaining two witnesses were permitted to testify only for the purpose of connecting appellant's exhibits 4 and 5 with the merchandise at bar: (1) Mr. Jack Rosenblum, who was employed as a stylist, production man and salesman by a manufacturer of ladies' skirts and sportswear in New York City, stated that he had manufactured appellant's exhibit 4.[1] (2) Mr. Oscar Zinn, in charge of selling and styling textiles for the appellant, testified that he styled and assisted in the production of appellant's exhibit 5. He also stated that the selvage on appellant's exhibit 1 is part of the fabric.

The testimony of the witnesses for the Government is summarized by the Custom Court:

> As heretofore indicated, all of the witnesses for the defendant testified that the imported fabric was not an ornamented fabric. In summary, the pertinent reasons for this conclusion were as follows: That braid is never

[1] The Customs Court quoted the following testimony by Mr. Rosenblum on cross-examination, with respect to the use of selvage by the witness:

> Q. * * * How do you normally use the selvage? A. Normally if it doesn't have any ornamentation for any garment, I would cut it, and if it fell into the seam, that is where it would end up.
>
> * * * * * *
>
> Q. And I understand your testimony now then to be that normally the selvage is used in the seam, or the hem, or some other part of the garment which is not visible? A. That is right. [References to the record below omitted.]

applied only to the selvage to produce an ornamental fabric (Witness Schwartz); that dress manufacturers do not use merchandise similar to plaintiff's exhibit 1 in the manufacture of dresses and skirts "because they couldn't use stuff that is on the selvage. They cut the selvage off" (Witness Schwartz); that none of the fabrics in either plaintiff's exhibit 1 or defendant's collective illustrative exhibit A would be considered in the trade to be ornamented fabrics, because the braid is attached only to the selvage, which is cut off in the end use (Witness Schwartz), (Witness Wilkinson), (Witness Price), (Witness Dante); that a selvage is the extreme edge of a fabric, and is not considered a useful part of the fabric, but is extraneous and is not considered in measuring its width (Witness Wilkinson), (Witness Selden), (Witness Price), (Witness Dante); that an ornamented fabric would usually have a pattern or design visible on the surface of the fabric or is one embellished in such a manner that it is evident on the fabric (Witness Wilkinson), (Witness Selden), (Witness Price), (Witness Dante), (Witness Kleinwald); that embroidery is never applied to the selvage of a fabric, unless the selvage is part of a design (Witness Kleinwald), (Witness Groder).

With respect to plaintiff's exhibits 4 and 5, the witnesses for the defendant testified that the braid in plaintiff's exhibit 4 is on the selvage and that it is an ornamentation on the skirt (Witness Schwartz); that the braid on plaintiff's exhibits 4 and 5 ornaments the

garments but not the fabric from which they were produced (Witness Wilkinson, Witness Price); that the braid on plaintiff's exhibit 4 was put on there for a utilitarian purpose, "to cover a selvage which might be raw" (Witness Kleinwald); that the braid on plaintiff's exhibit 4 did not decorate the garment, but was just "a black piping down the front of the goods" (Witness Groder). [References to the record below omitted.]

The Customs Court, in a 2 to 1 decision, overuled appellant's protest and found the imported merchandise to be not "ornamented fabrics" within the meaning of item 353.50 of the Tariff Schedules. In so holding, the majority of the Customs Court quoted the following explanatory notes contained in the Tariff Classification Study, published by the Tariff Commission on November 15, 1960 which was prior to the enactment of the Tariff Classification Schedules:

> Under the proposed definition of "ornamented," textile articles would no longer be assessed with rates of duty derived from paragraph 1529(a) on the basis of concealed, functionless pieces of braid, netting, etc. The rates derived from paragraph 1529(a) would apply only if such materials were used primarily for ornamentation.

Inasmuch as the above "study" was published prior to the enactment of the schedules by the Congress and was before Congress at that time, the majority below regarded

the study to have the same standing as Summaries of Tariff Information which is recognized by the courts as authoritative for the purpose of resolving questions relating to the meaning and scope of terms appearing in tariff acts and in determining the intent of Congress. *Textile Printing & Finishing Co., Inc.* v. *United States*, 49 CCPA 24, C.A.D. 789. In addition, the majority below quoted the following statement concerning item 353.50 "which appears in the additional explanatory notes and background materials to the Seventh Supplemental Report of the United States Tariff Commission, issued pursuant to sections 101(b)(4) and 101(c) of the Tariff Classification Act of 1962 (P.L. 87-456), submitted to Congress, at its request, on August 14, 1963, prior to the effective date of the Tariff Schedules of the United States, page 100":

> *Ornamented Fabrics.* The status of fabrics in the piece with a braid attached on the selvage is subject to a different test under this term than under the applicable existing tariff provision. The existing requirement that the article merely be "in part of" braid is less exacting. Under the new provision, the braid must in fact ornament the fabric in an acceptable trade sense. *This would normally call for repetitive ornamentation throughout the length of the piece goods, not so affixed that it would in normal disposition be trimmed off or hidden.* [Emphasis ours.]

The majority below found the last quoted statement to clearly indicate what was meant by use of the term "ornamented fabrics" and that the absence of the phrase "in

part of" braid, which was present in paragraph 1529(a) of the Tariff Act of 1930, shows a departure from the then existing law. Again referring to the last quoted statement, the majority of the Customs Court found the sentence "under the new provision, the braid must in fact ornament the fabric in an acceptable trade sense" supports the position of the Government in view of the testimony of the witnesses. The Customs Court found that testimony of the trade witnesses supplied by the Government, to the effect that the imported merchandise is not an "ornamented fabric," shows that the braid does not ornament the *fabric* "in an acceptable trade sense."

Appellant's principal argument seems to us to be that the words of item 353.50 are clear and unambiguous and, therefore, there is no justification to resort to legislative history. Citing the recent case of *Sandoz Chemical Works, Inc.* v. *United States*, 50 CCPA 31, C.A.D. 815, appellant invites our attention to the rule that where a statute is devoid of doubt or ambiguity the court may not resort to the rules of statutory construction to arrive at the legislative intent.

The Government's contention is three-fold: (1) Appellant has failed to rebut the presumption of correctness attaching to the collector's classification in failing to positively establish that the merchandise is an ornamented fabric; (2) the record herein establishes that the imported merchandise is not an ornamented fabric; and (3) in view of the inherent ambiguity in the term "ornamented fabrics," the Customs Court did not err in referring to the

testimony of record and the legislative history of item 353.50.

We agree with the Government in that the issue in this case is not whether the braid on the selvage is ornamental but whether the braid ornaments the imported fabric in such a way as to make the merchandise an ornamented fabric. Applied to the circumstances of the present case, we find the term "ornamented fabrics" to be ambiguous, taking that word in the sense that the court is not entirely certain of the meaning of the statutory language when applied to the particular facts of this case. Therefore, resort to pertinent authoritative materials to ascertain the meaning of the term is permissible.

The majority below found, and we agree, that the testimony of the witnesses clearly establishes that the selvage is normally not conisdered a part of the surface of the fabric. Applying this finding of fact to the explanatory note contained in the Tariff Classification Study and in the Seven Supplemental Reports of the United States Tariff Commission, both quoted above, we conclude that the instant import is not ornamented fabric within the meaning of item 353.50 of the Tariff Schedules.

Appellant argues that the merchandise in issue is an entirety as imported and the integral parts thereof cannot be treated separately for classification purposes. If by this "entirety" argument appellant means to contend that if a part of the imported fabric is "ornamented" then the entire fabric must be considered to be "ornamented," we would disagree. This line of argument is clearly contrary

to the explanatory notes quoted above. Furthermore, the argument appears to be equally applicable to a fabric having a particularly attractive label attached thereto but we question whether such a label would, ipso facto, make the entire fabric an "ornamented fabric" for the purposes of customs statutes.

In view of the foregoing, the judgment below is *affirmed.*

AFFIRMED

SMITH, *J.*, concurs in the result.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 533

RIFKIN TEXTILES CORP., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner imported bolts of a woven wool fabric having braid sewn over both selvaged [1] edges for the full length of the bolt. The Collector of Customs at the Port of New York classified the fabric under Item 336.50 of the Tariff Schedules of the United States (TSUS), 19 U.S.C. (1964 ed.) § 1202, as

[1] A selvage results from the weaving process and is the edge of a piece of woven fabric, of different construction from the body of the fabric, which keeps the fabric from unravelling or distorting.

"Other [woven fabrics, of wool, weighing over four ounces per square yard]: Valued not over $1.26⅔ per pound,"[2] with a rate of duty of 37.5 cents per pound plus 60% ad valorem. The petitioner challenged this classification in the Customs Court, contending that the merchandise should have been classified under Item 353.50, as "Ornamented fabrics," with a lower rate of duty of 42.5% ad valorem. "Ornamented" is defined in Headnote 3 of Schedule 3 (Textile Fibers and Textile Products) of the Tariff Schedules (so far as is relevant here) as "fabrics * * * which are ornamented with * * * braid."

The Customs Court, by a divided vote, decided that the merchandise in question was not an ornamented fabric. The Court of Customs and Patent Appeals unanimously affirmed.

2. The resolution by the courts below of the tariff classification question is correct and, in any event, does not warrant further review. Moreover, there is no merit to petitioner's claim that there was a denial of procedural due process.

a. The courts below correctly concluded, as had the Collector of Customs, that the merchandise in question did not come within the classification "ornamented fabrics." As both courts pointed out (Pet. App. A16-A19, A31-A33), the legislative history of Schedule 3 of the TSUS discloses that, to receive that classification, it is not enough that (as here) there is ornamentation attached to the selvages. Specifi-

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[2] It is agreed that Item 336.50 is the proper classification for the fabric unless it meets the requirements of Item 353.50.

cally, the explanatory notes to the Tariff Commission's Tariff Classification Study[3] state (Schedule 3, p. 7):

> Under the proposed definition of "ornamented", textile articles would no longer be assessed with rates of duty derived from paragraph 1529(a) on the basis of concealed, functionless pieces of braid, netting, etc. The rates derived from paragraph 1529(a) would apply only if such materials were used primarily for ornamentation.

Even more pointedly, the explanatory note to the Seventh Supplemental Report observes (p. 100):

> *Ornamented Fabrics.* The status of fabrics in the piece with a braid attached on the selvage is subject to a different test under this term than under the applicable existing tariff provision. The existing requirement that the article merely be "in part of" braid is less exacting. Under the new provision, the braid must in fact ornament the fabric in an acceptable trade sense. This would normally call for repetitive ornamentation throughout the length of the piece goods, not so affixed that it would in normal disposition be trimmed off or hidden.

With respect to the merchandise here involved, the courts below found that in normal disposition the selvages would be trimmed off or hidden. As it is undis-

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[3] The Study, as charged by seven Supplemental Reports, became the Tariff Schedules of the United States, with statutory status, see Pub. L. 87-456, May 24, 1962, 76 Stat. 72, as amended by Pub. L. 87-794, Oct. 11, 1962, 76 Stat. 882; 28 Fed. Reg. 8599, Aug. 17, 1963; Proc. No. 3548, Aug. 21, 1963, 28 Fed. Reg. 9279.

puted that no other part of the fabric is ornamented, the merchandise was properly classified.

b. Nor does petitioner's claim (Pet. 18-20) of procedural error present a question warranting review by this Court. With full awareness of the issue in the case and of the nature of the evidence which the United States intended to introduce, petitioner stated at two pre-trial conferences that its case in chief would be limited to the introduction into evidence of the fabric itself and dictionary definitions (R. 11-17, 25-28).[4] Its last statement concerning the limit of the proof it would introduce came at a pre-trial conference called specifically to discuss the problem of presentation of evidence. At trial, the court limited petitioner's case in chief to that encompassed within its own repeated pre-trial stipulation and accordingly excluded other proffered testimony relating to the trade meaning of the term "ornamented" (R. 46-47).[5] It rejected, as improper rebuttal, that portion of the proposed rebuttal testimony which was directed precisely at the main issue in the case, i.e., the meaning of the term "ornamented fabric," and thus should have been presented as part of the

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[4] "R" refers to the printed record on appeal in the Court of Customs and Patent Appeals.

[5] The statement by Judge Wilson—"You should reserve that for your rebuttal"—must be viewed in context as sustaining the objection based on the pre-trial agreement and as merely stating that the only way the evidence might come in, *if at all*, would be on rebuttal. No prejudice to petitioner resulted from the remark: the agreement and decision to limit the case in chief had already been made, and thus the remark did not lead petitioner into limiting his case in chief.

case in chief. We submit that this determination of the Customs Court was in basic accord with the pre-trial agreements of the parties and was clearly a matter for the trial court's discretion which does not warrant further review. In any event, the exclusion of the proffered testimony would, at most, be harmless error since, as we showed in part a *supra*, the history of this tariff provision makes it clear that the subject goods are not "ornamented fabrics."

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967

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